SUPREME COURT, U. S.
No. 428
JUL 27 196
JOHN F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D.C. 20005
Attorneys for Petitioners

Of Counsel:
COVINGTON & BURLING
701 Union Trust Building
Washington, D.C. 20005

July, 1967

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND RULES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
I. In Interpreting the Communications Act, the Lower Court Decision Has Created a Conflict in the Circuits and Seriously Misconstrued this Court's Opinion in *Regents v. Carroll*, 338 U.S. 586 (1950)	7
II. The Questions Presented by this Case Are of Paramount Importance to Effective Regulation of Television in the Public Interest in Accordance with Congressional Policy	12
CONCLUSION	16

CITATIONS

CASES:

Amerada Petroleum Corp. v. FPC, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976 (1962)	10
American Trucking Ass'n v. United States, 344 U.S. 298 (1953)	9
Buckeye Cablevision, Inc. v. FCC, No. 20274 (D.C. Cir., June 30, 1967)	8, 9, 11
R. A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962)	10
Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965)	8
Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954)	13
In re Midwest Television, Inc., 4 F.C.C.2d 612 (1966)	6

	Page
National Broadcasting Co. v. United States, 319 U.S. 190 (1943)	11
Niagara Mohawk Power Corp. v. FPC, No. 19887 (D.C. Cir., May 18, 1967)	10
Public Serv. Comm'n v. FPC, 327 F.2d 893 (1964)	10
Regents v. Carroll, 338 U.S. 586 (1950)	11
Second Report and Order, 2 F.C.C.2d 725 (1966)	14, 15
United Artists TV, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, __F.2d__(2d Cir. 1967)	3
Valley Vision, Inc. v. United States, Nos. 21869-70 (9th Cir., June 29, 1967) (Order)	7
STATUTES AND RULES:	
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* (1964):	
Section 1, 47 U.S.C. § 151	8
Section 2(a), 47 U.S.C. § 152(a)	8
Section 3(a), 47 U.S.C. § 153(a)	8
Section 3(b), 47 U.S.C. § 153(b)	8
Section 3(e), 47 U.S.C. § 153(e)	8
Section 4(i), 47 U.S.C. § 154(i)	6, 9, 10
Section 303(f), 47 U.S.C. § 303(f)	9
Section 303(h), 47 U.S.C. § 303(h)	8
Section 303(r), 47 U.S.C. § 303(r)	6, 9
Section 303(s), 47 U.S.C. § 303(s)	13
Section 307(b), 47 U.S.C. § 307(b)	8, 12
Section 312(b), 47 U.S.C. § 312(b)	8, 9, 11
Natural Gas Act, Section 16, 52 Stat. 830 (1938), 15 U.S.C. § 717*o* (1964)	10
Rules of the Federal Communications Commission, 47 C.F.R. 74.1101 *et seq.* (1967):	
Sections 74.1101 to .1109	4

Page

Section 74.1107(a) 4

Section 74.1107(c) 5

Section 74.1107(d) 5

Section 74.1109(a) 5

MISCELLANEOUS:

H.R. Rep. No. 1559, 87th Cong., 2d Sess. (1962) 13

S. Rep. No. 1526, 87th Cong., 2d Sess. (1962) 13

Supreme Court of the United States

OCTOBER TERM, 1967

No.

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 28, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A of the petition of the United States.[1]

[1] The United States and the Federal Communications Commission have petitioned together in No. 363, Oct. Term, 1967, for certiorari to review the same decision involved in this petition. The material printed in the appendices to the petition of the United States will be designated herein as "U.S. App." References designated "R." refer to the Appendix of the United States and Commission as respondents in the Court of Appeals, 10 copies of which have been filed in this Court.

The memorandum opinion and order of the Federal Communications Commission, reported at 4 F.C.C. 2d 612, appears at Appendix C of the petition of the United States.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1967, and appears at Appendix B of the petition of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964) and 28 U.S.C.A. § 2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority under the Communications Act of 1934 to adopt rules regulating directly the operations of non-microwave-served community antenna television (CATV) systems.

2. Whether such authority encompasses a rule designed to preserve the status quo by preventing expansion of service by such CATV systems pending the Commission's evidentiary proceeding to determine whether the expansion would be contrary to the public interest.

STATUTES AND RULES INVOLVED

Section 1, 2(a), 3(a), 3(b), 3(e), 4(i), 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 153(b), 153(e), 154(i), 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) (1964), all of which are set forth in Appendix E of the petition of the United States except for Section 3(b) which appears in Appendix A of this petition.

Sections 74.1107 and 74.1109 of the Rules of the Federal Communications Commission, 47 C.F.R. 74.1107 and .1109 (1967), which are set forth in Appendix F of the petition of the United States.

STATEMENT

This case involves the continuing effort of the Federal Communications Commission to establish and maintain in the United States a system of television broadcasting utilizing a large number of local stations rather than a handful of superstations. This policy, designed to assure widespread free television and a balance between national and locally oriented programming, has been upheld by the courts and approved by the Congress. The most recent threat to fulfillment of the policy has been posed by community antenna television (CATV).

CATV systems are designed to capture television signals from another city that distance or other natural conditions would prevent television sets from receiving adequately or at all in the CATV-served community. After being collected, often by a master antenna located at high elevation, and sometimes after being relayed by microwave radio over considerable distances, the signals are amplified so that coaxial cable can carry them into the community and then into individual homes where a line is hooked directly into the television set. The systems, which are not subject to licensing by the Commission as radio stations, "consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed" for CATV operations. *United Artists TV, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D.N.Y. 1966), *aff'd*, ___F.2d___(2d Cir. 1967).

Although CATV first made its mark bringing two or three stations into communities having little or no television service available "off the air," many systems are now being es-

tablished or proposed to carry numerous stations from cities like New York and Los Angeles into large and small communities throughout the country which are or would otherwise be amply served by a number of local or neighboring stations. These local stations must be sustained by advertising, the level of which depends upon each local station retaining an adequate viewing audience. By bringing distant signals into a community CATV systems splinter or fragment this audience requisite to the survival of existing local stations and the development of new ones.

Concern with this growing threat to the viability of existing and proposed local stations – especially to less firmly rooted independent ultra-high frequency (UHF) stations – led the Commission, after extensive rulemaking proceedings, to adopt comprehensive rules to regulate all CATV systems, whether or not served by microwave.[2] Several of the provisions, central to the regulatory scheme, relate to CATV carriage of distant signals. These provide that no new CATV system may carry into the Grade A contour of any local station in the 100 largest television markets the signal of any "distant" station (*i.e.*, one whose Grade B contour does not reach the community)[3] except upon a showing in an evidentiary hearing that such carriage is consistent with the public interest and, specifically, the establishment and healthy maintenance of local television broadcast service. 47 C.F.R. § 74.1107(a) (1967). Under a "grandfather" clause, signals being carried by existing systems on February 15, 1966, are excepted from this limitation. It does, however, apply to any geographic expansion by such sys-

---

[2]These rules, 47 C.F.R. §§ 74.1101 to .1109 (1967), are set forth in relevant part in Appendix F of the petition of the United States.

[3]The Grade A contour of a station delimits the area along whose outer perimeter good television reception may be expected 90 percent of the time at the best 70 percent of the locations. The Grade B contour is the line at which good reception may be expected 90 percent of the time at the best 50 percent of the locations.

tems where the public interest so requires; and temporary relief against expansion pending a hearing on the public interest question is authorized. 47 C.F.R. § 74.1107(d) (1967). Where special circumstances warrant, these restrictions on carriage of distant signals may be waived or augmented or applied outside the 100 largest markets. 47 C.F.R. §§ 74.1107(c), 74.1109(a) (1967).

Pursuant to these rules, petitioner Midwest Television, Inc., licensee of a television station in San Diego, California,[4] invoked the Commission's rules against respondents, four interrelated companies involved in CATV operations in San Diego. Affidavits and other submissions by petitioners showed the following: Respondents, possessing grandfather rights under the CATV rules, were importing into San Diego on a rapidly expanding basis the signals of most or all of Los Angeles' seven commercial VHF television stations. San Diego, fifty-fourth largest television market in the country, was already well served by four local and neighboring English-language television stations and one Spanish-language station and there was a prospect of two or three additional stations. Further significant expansion of respondents' CATV systems would fragment the viewing audience to the point of imperiling the ability of the existing stations to operate in the public interest and of unborn stations to come into being.

Accordingly, the Commission was requested to restrain, pendente lite and then permanently after hearings, any further expansion of respondents' CATV systems so far as they carry Los Angeles signals. After respondents replied through

---

[4] Midwest Television, Inc. operates a network affiliate, a very high frequency (VHF) station. A second petitioner, San Diego Telecasters, Inc., operates an unaffiliated UHF station, and the third, Jack O. Gross, holds a permit from the Commission to construct another UHF station. All three petitioners intervened in the proceeding when it reached the Court of Appeals.

pleadings, affidavits and other documents, the Commission ruled that there existed "a classic case" for a full evidentiary hearing on CATV's impact on San Diego television and designated the case for hearing. 4 F.C.C. 2d at 620 (U.S. App. C, p. 48). The Commission found interim relief to be essential, noting the "impracticability of withdrawing [CATV] service, once established, because of its disruptive effect," and the "strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted." 4 F.C.C. 2d at 621 (U.S. App. C., p. 50). It therefore ordered respondents not to expand their systems, with certain exceptions, by adding new subscribers to receive Los Angeles signals pending the outcome of the ordered evidentiary hearing.[5]

Respondents appealed the Commission's grant of interim relief to the Court of Appeals for the Ninth Circuit.[6] After effecting a minor modification in the Commission's interim order pending review, the Ninth Circuit ruled that the Commission lacked statutory authority to issue the order because "sections 4(i) and 303(r) [of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) (1964), conferring general rulemaking authority upon the Commission] are limited to the scope of the Commission's licensing authority." (U.S. App. A, p. 29). Accordingly, the court set aside the Commis-

---

[5] Expansion to carry signals other than those of Los Angeles stations was not affected by the order at all. As to Los Angeles signals, under the Commission's order new lines carrying them could be built and new subscribers added to receive them in designated geographic areas in which the systems had been operating on the grandfather clause date; the Ninth Circuit further liberalized the order by allowing new subscribers to be added to any trunk and feeder lines existing at the date of the order.

[6] Jurisdiction of the Court of Appeals was founded upon Section 402(a) of the Communications Act, 47 U.S.C. § 402(a) (1964), and the Judicial Review Act of 1950, 5 U.S.C. §§ 1031-42 (1964).

sion's grant of interim relief but stayed its own mandate pending certiorari proceedings. Mr. Justice Brennan subsequently amended the stay of mandate to permit the United States and the Commission further time to file their petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. In Interpreting the Communications Act, the Lower Court Decision Has Created a Conflict in the Circuits and Seriously Misconstrued this Court's Opinion in *Regents v. Carroll*, 338 U.S. 586 (1950).

The Court of Appeals' decision held that the Commission lacked power to issue interim orders, upon notice and opportunity for written arguments and affidavits, to limit expansion of existing CATV systems pending full evidentiary hearings. This position would also imperil the automatic limitations, pending Commission action, on new CATV systems and carriage of new distant signals by existing CATV systems since those limitations rest on the same statutory foundation. Unless temporary limitations on CATV distant signal carriage can be provided, CATV operations may become permanently entrenched while the Commission decides whether to hold hearings and while hearings actually proceed. Thus the lack of temporary limitations would jeopardize the Commission's entire program for regulation of CATV distant signal carriage. Moreover, the underlying rationale of the court's ruling is that the Commission utterly lacks statutory authority to regulate CATV systems directly, for the court stated that the Commission's rulemaking power does not extend beyond station licensees, and CATV systems are not licensed as stations by the Commission.[7] In either event, the grant of certiorari is justified because the decision gives rise to

---

[7] In an order dated June 29, 1967, in Valley Vision, Inc. v. United States, Nos. 21869-70, the Ninth Circuit implied a broad construction of the present decision by citing it as the sole reason for temporarily staying a cease and desist order enforcing the CATV rules.

a conflict among the circuits and is based on a fundamental misreading of an opinion of this Court.

The lower court decision is in square conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. FCC*, No. 20274 (June 30, 1967), not yet reported but reprinted in Appendix D of the petition of the United States. In the present case the court stated that the Commission's regulatory power does not extend beyond licensees to reach CATV companies engaged in retransmission of television signals by wire. In *Buckeye*, the Commission had found a CATV company to be carrying distant signals into a community in violation of the Commission's CATV rules and had issued a cease and desist order against the company under Section 312(b) of the Communications Act. 47 U.S.C. § 312(b) (1964). In rejecting on appeal the company's contention that the Act granted no authority to regulate CATV systems directly, the District of Columbia court relied on the precise statutes and reasoning rejected in this case by the Ninth Circuit Court of Appeals.

The provisions of the Act expressly apply to "all interstate ... communication by wire or radio" and "all persons engaged . . . in such communication," § 2(a), 47 U.S.C. § 152(a) (1964), and *Buckeye* upheld the Commission's conclusion that CATV systems fall squarely within this category as defined by statute and case law.[8] The Act mandates the Commission to provide "a rapid, efficient, Nation-wide . . . wire and communication service," and, *inter alia*, to establish "areas or zones to be served by any [broadcast] station" and to issue broadcast licenses "to provide a fair, efficient, and equitable distribution of radio service" to states and local communities. §§ 1, 303(h), 307(b), 47 U.S.C. §§ 151, 303(h), 307(b) (1964). The court in *Buckeye* found that,

---

[8] §§ 3(a), 3(b), 3(e), 47 U.S.C. §§ 153(a), 153(b), 153(e) (1964); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965). It does not appear that respondents seriously contend otherwise.

to meet these responsibilities in the face of the threat posed by CATV, the Commission had pursued "an eminently reasonable course" (U.S. App. D, p. 72), properly exercising its statutory authority to promulgate rules and regulations necessary to execute its functions. §§ 4(i), 303(f), 303(r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964).

The District of Columbia Circuit explicitly rejected the CATV company's argument, which underlies the decision of the Ninth Circuit in this case, that "the Commission's powers are rigidly compartmentalized into 'licensing' and 'public utility regulation' functions," neither of which encompassed CATV. (U.S. App. D, p. 73, n. 19). The court pointed to settled decisions, construing the Communications Act as well as other regulatory statutes, that agencies are empowered to deal with aligned activities that may affect the regulatory scheme without possessing detailed statutory directions. *E.g., American Trucking Ass'ns v. United States*, 344 U.S. 298, 311 (1953). In sum, *Buckeye* squarely conflicts with the Ninth Circuit decision in this case.[9]

The Ninth Circuit's references to the cease and desist power and its procedures suggest the decision would in all events require that the Commission conduct a full evidentiary hearing before limiting the spread of CATV systems. This position, no less erroneous than the broader one, brings the Ninth Circuit into conflict with decisions of both the Tenth and District of Columbia Circuits upholding agency power to take temporary action under broad rulemaking authority.

---

[9]The conflict is in no way lessened by the Commission's reliance in *Buckeye* on its power to issue cease and desist orders against violators of its rules. Section 312(b), 47 U.S.C. § 312(b) (1964). The Commission's determination to proceed, as in the present case, upon a particularized finding that the public interest is threatened rather than through a blanket restriction enforceable by cease and desist orders, as in *Buckeye*, can hardly diminish its substantive jurisdiction over CATV.

The Tenth Circuit decision is *Amerada Petroleum Corp. v. FPC*, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976 (1962), upholding the Federal Power Commission's temporary restraint on the filing of a new gas rate schedule while a previously filed schedule was under investigation. There being no explicit grant of such power, the court relied importantly on the grant in Section 16 of the Natural Gas Act of authority to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as [the FPC] may find necessary or appropriate" to carry out the Act's provisions. 15 U.S.C. § 717*o* (1964). This language bears a striking resemblance to Section 4(i) of the Communications Act which authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1964).

The District of Columbia Circuit has similarly relied on general grants of authority in regulatory statutes to allow exigent temporary action not authorized in specific terms. For example, *R. A. Holman & Co. v. SEC*, 299 F.2d 127, 132 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), relying in part on the "broad rule-making powers" of the Securities and Exchange Commission, sustained its power to suspend pending a hearing on various charges a broker-dealer's privilege to underwrite exempted securities.[10]

The unusually broad general grant of authority in the Communications Act can hardly deserve a more grudging

---

[10]This stay effectively deprived the broker-dealer of part of his going business apparently without any chance to refute the charges, while the present FCC order merely stays *expansion* of the CATV systems in certain respects and issued only after notice and submission of written statements, affidavits and documents by both sides. Other District of Columbia Circuit cases following *Holman*'s approach are Public Serv. Comm'n v. FPC, 327 F.2d 893 (1964) (Natural Gas Act), and Niagara Mohawk Power Corp. v. FPC, No. 19887 (May 18, 1967) (Federal Power Act).

interpretation than the Natural Gas and Securities Acts' provisions when this court has itself reiterated that Congress "gave the [Federal Communications] Commission not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

Certiorari is additionally warranted to review the Ninth Circuit decision because it rests principally upon a complete misconstruction of this Court's opinion in *Regents v. Carroll*, 338 U.S. 586 (1950), whose language the Court of Appeals found "guided" its "resolution" of the present case. (U.S. App. A, p. 27). In *Carroll*, the FCC declined to renew a license until the station licensee repudiated a contract with a non-licensed company formerly managing the station. After the licensee repudiated the agreement, the Supreme Court upheld a state court award of damages against it for breach of the contract. The opinion stated that the Commission's general power to fix necessary "conditions" was to be construed in connection with its licensing power and the conditions "cannot directly affect the applicant's responsibilities to a third party . . . ." 338 U.S. at 600.

The management company in *Carroll* was treated as a private concern with no status under the Act. The Court's general language relied on by the Ninth Circuit was addressed to this context of facts. As *Buckeye* correctly declared, *Carroll* "does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations . . . ." (U.S. App. D, p. 73.).[11] The Ninth Circuit has extended *Carroll* to limit or deny the Commission authority over companies engaged in interstate "communication by wire or radio" which are explicitly stated to be with-

[11] The District of Columbia Circuit in *Buckeye* also questioned whether *Carroll* would be followed today even on its own facts in light of the subsequent amendment of the Communications Act to give the Commission power to issue cease and desist orders against "any person" violating the Act or regulations under it. § 312(b), 47 U.S.C. § 312(b) (1964).

in the purview of the Act. The extension is a giant one meriting prompt correction by this Court.

II. The Questions Presented by this Case Are of Paramount Importance to Effective Regulation of Television in the Public Interest in Accordance with Congressional Policy

Quite apart from the conflict in the circuits and the misreading of an opinion of this Court, the present case deserves review because of the vast and detrimental impact it threatens to have upon the effective regulation not merely of CATV but of television broadcasting itself. Whether read broadly or narrowly, the lower court decision construes the Communications Act in a fashion that imperils the long-standing national policy of fostering locally based television broadcasting service and the more recent manifestation of that policy in Congressional and Commission efforts to promote the growth of UHF broadcasting.

The Commission's program to achieve a system based on local television broadcast outlets dates back to the first days of regulation of the television industry. In 1952, the Commission adopted its Table of Assignments allocating channels to individual communities across the country and limiting their tower heights and transmitter power to circumscribe their range and prevent interference. This Table represented the Commission's determination to shape the growth of television along lines deemed most consonant with the public interest, defined by Congress as "a fair, efficient, and equitable distribution of radio service" to all of the states and local communities. § 307(b), 47 U.S.C. § 307(b) (1964). In framing the Table of Assignments, the Commission rejected a plan to maximize national television coverage through the use of superpower stations. Instead, it chose to balance the nationally oriented programming, available through networks and other national program distributors, by providing for numerous local and area television stations that could tailor their programs to local needs and interests and serve as outlets for local self-expression.

The decision to adopt this balanced approach, followed ever since by the Commission, was sustained by the courts, *e.g., Logansport Broadcasting Corp. v. United States,* 210 F.2d 24 (D.C. Cir. 1954), and sanctioned by Congress when it enacted the All-Channel Receiver Law in 1962. See H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 5-7, (1962). This legislation, Act of July 10, 1962, 76 Stat. 150, adding Section 303(s) to the Communications Act, took the unusual step of empowering the Commission to require that new television sets be built to receive UHF as well as VHF stations. The expressed aim was to broaden television service by making it practicable to develop for local use the UHF channels until then both numerous and vacant and not receivable on standard television sets.

CATV seriously threatens these policy goals of the Commission and Congress when, as indicated earlier, it fragments local television audiences by importing numerous outside signals into the community. As the available local audience is divided into ever smaller segments, the ability of local stations to support themselves on advertising revenues plummets and their survival is jeopardized. Even among those stations not eliminated outright, the losses work to impair the quality of the programming and forestall improvement. Prospective local stations are discouraged or prevented from going on the air.

In the end, the area which began with a balance and choice between local and national television programming can find national or huge metropolis television piped in by CATV alone available. Additionally, in the absence of local broadcast stations, the viewer in the community must pay CATV installation and subscription fees, assuming he can afford them, to receive television service once available for free. And for outlying areas, once covered by local stations, there may be no television at all because sparse pop-

ulation makes it uneconomical for CATV systems to extend their lines so far.[12]

The Commission has met this challenge to its program in a highly restrained manner. It took no action at all until voluminous and comprehensive comments were solicited and considered. It declined to ban CATV distant signal carriage outright in areas already directly served by television broadcast stations although this course had much to commend it. Instead, it promulgated its present rules allowing CATV to bring distant signals into a community if, after its procedures are invoked, the Commission finds this to be consistent with the public interest. CATV systems already in operation at the date of the new rules are allowed to continue and they are restrained from expanding further only if the public interest calls for a halt pending a hearing or after Commission consideration. In the present instance, for example, the partial limit on expansion came only after affidavits and other documents demonstrated the severe threat CATV expansion posed to local television, present and proposed, in the particular context of the San Diego area.

If the Ninth Circuit decision were the law, the entire carefully designed program of the Commission could be undone and the Commission and local television broadcast service left helpless before CATV. On this score, it matters not whether the Ninth Circuit's opinion is read broadly or narrowly. Obviously the former is calamitous, for it would mean that the Commission has no direct authority over CATV. But the same practical result could be wrought if the Commission could not maintain the status quo and thereby prevent CATV distant signal entrenchment before the public interest could be determined in particular situations. The practical outcome is likely to be the same be-

---

[12] The potential adverse impact on local television, especially upon UHF broadcasting which has only begun to take hold, is described and documented at length in the Commission's Second Report and Order, 2 F.C.C.2d 725, 770-80 (1966) (R. 94-104).

cause, as the Commission stated in its report issuing the CATV rules:

> "Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation . . . . " 2 F.C.C. 2d at 782 (R. 106).

The disruption, once the capital investment in new CATV lines and equipment has been made, individual sets wired in thousands of homes, and viewing habits altered, is easy enough to picture. What should also be borne in mind is that during the interim period, necessarily drawn out in some cases, unchecked CATV expansion may doom irrevocably one or more present or potential local stations that could have been saved if a delay had been effected pending Commission consideration of the public interest.

The scope of the basic questions presented goes far beyond the present case, and the area is one that promises to spawn litigation and conflicts for some time to come absent a decision by this Court. The CATV distant signal rules apply automatically to systems operating in the 100 largest television markets in the United States, areas encompassing in the aggregate 90 percent of the total population. 2 F.C.C. 2d at 783 (R. 107). In each of these markets there may be numerous CATV systems proposed or in operation; indeed, in the San Diego community there are nearly half a dozen actually in operation. In early 1966, the number of operating systems alone was approximately 1,600, 2 F.C.C. 2d at 771-72 (R. 95-96), with thousands more proposed, and systems once established can expand with extreme speed. Signals are now sometimes brought from hundreds of miles away and the number of channels carried is steadily being increased, all of which contributes further to the audience fragmentation and the danger to local television.

Television occupies a major role in American society and the economic life of the nation. Any decision cutting deep-

ly into established Commission and Congressional policies to guide television's development deserves review by reason of its singular importance. Certainly the test of importance is met by the present decision which could move the country far closer to the disadvantages and dangers of over-centralized communications media. For the sake of CATV itself as well as local television, the ground rules should be settled before it is too late, and quantities of needless litigation pretermitted. The significance of the issues presented warrants review of the decision of the Ninth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D.C. 20005
Attorneys for Petitioners
Midwest Television, Inc.
San Diego Telecasters, Inc.
Jack O. Gross

July, 1967.

Appendix A

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq. (1964):

Sec. 3. For the purposes of this Act, unless the context otherwise requires –

* * *

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.